

FILED BY CLERK

JAN 27 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2011-0315-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
DELL EDWIN BOSWELL,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR042154

Honorable Jose Robles, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

Dell Edwin Boswell

Florence
In Propria Persona

ESPINOSA, Judge.

¶1 Petitioner Dell Boswell seeks review of the trial court's order denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. "We will not disturb a trial court's ruling on a petition for post-conviction relief absent a clear abuse of discretion." *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Boswell has not sustained his burden of establishing such abuse here.

¶2 After a jury trial, Boswell was convicted of sexual conduct with a minor under the age of fourteen. The trial court sentenced Boswell to twenty-five years in prison. Boswell appealed, arguing the evidence was insufficient to support his conviction, and this court affirmed his conviction and sentence. *State v. Boswell*, No. 2 CA-CR 95-0405 (memorandum decision filed June 4, 1996).

¶3 Fourteen years later, in October 2010, Boswell filed a notice of post-conviction relief, citing Rule 32.1(f) and (g) as grounds for relief and arguing that the rule set forth in *Blakely v. Washington*, 542 U.S. 296 (2004), was a significant change in the law that entitled him to relief. In his subsequent petition for post-conviction relief, Boswell claimed that because the trial court had “aggravated [his] sentence without any introduction of aggravating circumstances to the jury for their decision” and because he had not admitted any such circumstances, his sentence had been imposed in violation of *Blakely* and he was entitled to be resentenced to a presumptive term. The trial court summarily denied relief, concluding *Blakely* did not apply to Boswell’s case, which had become final before *Blakely* was decided. We agree.

¶4 As the trial court noted, *Blakely* is not retroactive and only applies to convictions not yet final at the time it was decided in 2004. *State v. Febles*, 210 Ariz. 589, ¶ 7 & n.4, 115 P.3d 629, 632 & n.4 (App. 2005). “A conviction is final when ‘a judgment of conviction has rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied.’” *Id.* ¶ 9, quoting *State v. Towery*, 204 Ariz. 386, ¶ 8, 64 P.3d 828, 831-32 (2003). Boswell’s convictions became final when our mandate issued in July 1996, well before *Blakely* was decided. Thus, the trial court correctly concluded, *Blakely* does not apply to this case.

¶5 In support of a contrary conclusion, Boswell cites to a statement by the Supreme Court in *Cunningham v. California*, 549 U.S. 270 (2007). In that case, in reference to the rule that “any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt,” the Court stated: “While this rule is rooted in longstanding common-law practice, its explicit statement in our decisions is recent.” *Id.* at 281. Boswell relies on the first clause of this sentence, but ignores the second. And he cites no Supreme Court authority to otherwise contradict the Arizona courts’ conclusion that Blakely is not retroactively applicable.¹ See Ariz. R. Crim. P. 32.9(c)(1)(iv) (petition for review shall contain “the reasons why the petition should be granted”). Therefore, although we grant the petition for review, relief is denied.

/s/ *Philip G. Espinosa*

PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ *Garye L. Vásquez*

GARYE L. VÁSQUEZ, Presiding Judge

/s/ *Virginia C. Kelly*

VIRGINIA C. KELLY, Judge

¹On review Boswell also claims he is entitled to relief under Rule 32.1(d) because, as a result of the alleged *Blakely* error, he is being “held in custody after any *legally* imposed prison term has expired.” But, as outlined above, his aggravated sentence was lawfully imposed, and, in any event, he did not raise this issue below. See *State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980); see also Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review shall contain “[t]he issues which were decided by the trial court and which the defendant wishes to present” for review).